No. 4414

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FREDERICK V. LINEKER and FREDERICK V. LINEKER, as administrator of the Estate of Norvena Lineker, deceased,

Appellants,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON (formerly Mary J. Tynan), ADELAIDE McCOLGAN, as administratrix with the will annexed of the estate of Daniel A. McColgan, deceased (substituted in place and stead of said Daniel A. McColgan), EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO and STANISLAUS LAND AND ABSTRACT COMPANY,

Appellees.

BRIEF ON BEHALF OF APPELLEES, ADELAIDE McCOLGAN, AS ADMINISTRATRIX, ETC., AND R. McCOLGAN.

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Attorney for Appellees Adelaide McColgan, administratrix, etc., and R. McColgan.

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The statement of the case made in the brief of appellants contains many gross errors. It also

omits material facts. These errors and omissions will be specifically referred to hereafter.

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1. **THE JUDGMENT IN THE ACTION OF LINEKER V. McCOLGAN (NO. 5344) IS A PRIOR ADJUDICATION OF THE CAUSE OF ACTION IN THIS SUIT.**

The case at bar is for the same cause of action as the case of *Fred V. Lineker v. Daniel A. McColgan, R. McColgan, Eustace Cullinan, R. S. Marshall and Olive H. Marshall, his wife* (No. 5344), in which Judge Langdon rendered the judgment which was received in evidence. This is apparent from a comparison of the complaint in that case with the complaint in the case at bar.

On this appeal the exhibits are not printed in the transcript of the record but the original exhibits were transmitted to this court. The judgment roll in *Lineker v. McColgan* (No. 5344) is Defendants' Exhibit "A". The judgment roll in the action of *Lineker v. McColgan* (No. 5344) is also printed as an exhibit to the answer of the defendants Daniel A. McColgan, R. McColgan and Eustace Cullinan, and appears at pages 77 to 139 of the transcript of the record on the former appeal taken in the case, viz., the transcript of the record in No. 3964. In this brief, therefore, we shall refer both to Exhibit "A" and to the printed copy of the judgment roll contained in the transcript in No. 3964.

In the transactions involved in this litigation there were two separate deeds of trust. The first deed of trust was dated June 20, 1910, and will be referred to in this brief as the first deed of trust. The sale under this deed of trust was made on September 2, 1914. The second deed of trust was made on September 2, 1914, the same day that the sale under the first deed of trust was made. This last mentioned deed of trust will be referred to herein as the second deed of trust.

The gist of the complaint in the case at bar is that Daniel A. McColgan received, as the proceeds of the sale under the first deed of trust held on September 2, 1914, a sum in excess of the amount due him from plaintiffs, and that he be compelled to account for this excess, and that the second deed of trust made on September 2, 1914, was without consideration.

The following are all of the allegations of the complaint *in the case at bar* relating to the defendants Daniel A. McColgan and R. McColgan:

1. (Paragraph VII, Tr. in No. 3964, p. 4.) That the deed of trust of June 20, 1910, was made for benefit of Daniel A. McColgan and that in fact McColgan only loaned $2500 instead of $2850 mentioned in the note.

2. (Paragraph IX, Tr. in No. 3964, p. 5.) That the defendants R. McColgan and D. A. McColgan claimed that D. A. McColgan was entitled to $10,000 and upwards, under said

deed of trust "which claim was false and untrue to their knowledge".

3. (Paragraph IX, Tr. in No. 3964, p. 6.) That said defendants stated to F. V. Lineker that if he did not procure and turn over to them before September 2, 1914, the sum of $10,000, they would sell out the Linekers' interest and cause them to lose all their interest in said property.

4. (Paragraph IX, Tr. in No. 3964, p. 6.) That in order to prevent a sale of their interest in said property, plaintiffs procured Annie Connors to advance upon the security of said property $13,000 "and relying upon such promise the plaintiff F. V. Lineker was prepared to purchase said property at said sale and to bid at said sale such amount as might be necessary to protect the property from purchase by any one else".

5. (Paragraph X, Tr. in No. 3964, p. 6.) That shortly prior to the said sale, the defendants McColgans advised F. V. Lineker that he ought to bid $14,000 at the sale, and that it would make little or no difference in the final settlement of the accounts between plaintiffs and the said Daniel A. McColgan and R. McColgan, how much the plaintiffs bid for the property, for the reason that plaintiffs would only have to pay * * * what was justly due under said deed of trust and that all sums in excess of such amount for which the property might be sold would be accounted for to plaintiffs by

said defendants McColgans, and turned over to the plaintiffs by said defendant R. McColgan.

6. (Paragraph XI, Tr. in No. 3964, p. 7.) That the said plaintiffs "being inexperienced in business matters and particularly in matters relating to the transfer, sale or encumbrance of real property, and relying upon the advice and counsel of the defendants Daniel A. McColgan and R. McColgan, consented that the property be bought by said R. S. Marshall, as trustee for the plaintiff Frederick V. Lineker" and that "on the 2d day of August (September), 1914, the said real property was sold by R. McColgan, as trustee under said deed of trust, to the defendant R. S. Marshall, as agent and trustee for the plaintiff, Frederick V. Lineker, for the sum of fourteen thousand dollars ($14,000)."

7. (Paragraph XVI, Tr. in No. 3964, p. 12.) That the second deed of trust made on September 2, 1914, by Marshall and wife to R. McColgan and Eustace Cullinan, as trustees for the defendant Daniel A. McColgan, was without consideration and that the sale thereunder to the defendant E. C. Peck was void.

8. (Paragraph XIX, Tr. in No. 3964, p. 13.) That on the 2d day of September, 1914, the said Daniel A. McColgan received from said Annie Connors the sum of $13,000, which sum was greatly in excess of all moneys due or owing to him from the plaintiffs, or either of them.

9. (Paragraph XX, Tr. in No. 3964, p. 14.) That said Daniel A. McColgan and said R. McColgan have never paid over to the said plaintiffs, nor to either of them, any part of the said $13,000 so advanced by said Annie Connors and received by said defendants Daniel A. McColgan and R. McColgan, and have never accounted to the said plaintiffs, or either of them, for the said money or any part thereof.

It will be seen, therefore, that as to the defendants Daniel A. McColgan and R. McColgan, the plaintiffs assert two claims, viz.:

1. That Daniel A. McColgan received as the proceeds of the sale held on September 2, 1914, more than he was entitled to receive and that he should account to plaintiff for the alleged surplus.

2. That the second deed of trust was without consideration.

The prayer of the complaint is:

(a) That the deed of trust to secure $2455 and the sale thereunder be declared null and void.

(b) That D. A. McColgan and R. McColgan account to plaintiffs for the proceeds of the sale under the first deed of trust held on September 2, 1914.

An inspection of the complaint in action No. 5344 *(Lineker v. McColgan)*, commenced in the Superior

Court of Stanislaus County, shows that that action was for the same cause or causes of action which are the foundation of the plaintiffs' claim in the case at bar.

The complaint in action No. 5344 *(Lineker v. McColgan)* is printed in Defendants' Exhibit "A" and also at pages 77 et seq. of the transcript in No. 3964. With reference to the sale under the first deed of trust held on September 2, 1914, the complaint in *Lineker v. McColgan* (Action No. 5344) contains the following allegation, viz.:

> "That after said notice of sale had been given in the manner prescribed by said Deed of Trust, and prior to the sale of said real property as hereinbefore mentioned, plaintiff and defendant, Daniel A. McColgan, made and entered into an agreement wherein and whereby they agreed that plaintiff would purchase said real property at said sale for a sum of money sufficient in amount to pay the amount which said defendant, Daniel A. McColgan, claimed to be due to him from said Norvena E. S. Lineker, and expenses of said sale, and any other liens subsisting against said real property not secured by said Deed of Trust.
>
> "That at that time plaintiff made a formal demand upon said defendant, Daniel A. McColgan, that he render an account of the amount claimed to be due to him by said Norvena E. S. Lineker, but that said defendant, Daniel A. McColgan, refused to render any such account, though he then and there informed plaintiff that the said real property should be sold for the sum of $10,000.00, and which sum he informed plaintiff would be sufficient to repay the amount claimed to be due to him by said Norvena E.

S. Lineker, including the expenses of said sale, and also any other alleged liens subsisting against said real property, but not secured by said Deed of Trust.

"That thereupon plaintiff and said defendant, Daniel A. McColgan, further agreed that plaintiff would bid the sum of $10,000 for said real property at said sale, but upon the further understanding and agreement with said defendant, Daniel A. McColgan, that out of the proceeds of said sale coming into the hands of said last named defendant from said trustee, in the manner hereinafter alleged, he, said Daniel A. McColgan, would not pay, or cause to be paid, any of said alleged liens, until the same had been judicially determined to be valid and subsisting liens against said real property, and upon the further understanding that said defendant, Daniel A. McColgan, would account to plaintiff for all moneys coming into his hands as the proceeds of said sale." (Paragraph III of Complaint in Lineker v. McColgan, Tr. in No. 3964, p. 80.) (Defendants' Exhibit "A", p. 4.)

With reference to the plaintiff's demand for an accounting, the complaint in *Lineker v. McColgan* (No. 5344) contained the following allegations:

"Plaintiff has repeatedly requested and demanded of said defendant, Daniel A. McColgan, that he render an account of the said sum of $14,000.00, and that he pay plaintiff such a sum as, upon such accounting, might appear to be justly due him. but said defendant, Daniel A. McColgan, wholly refuses and declines, and does still refuse and decline, to render any account of said sum which is justly due or owing to him, in accordance with the agreement to that end had by and between plaintiff and defendant,

Daniel A. McColgan." (Defendants' Exhibit "A", p. 16; Tr. in No. 3964, p. 90.)

With reference to the deed of trust to secure $2455, executed on September 2, 1914 (the second deed of trust), and also with reference to the demand for an accounting, the complaint in *Lineker v. McColgan* (No. 5344) contains the following allegations, viz.:

> "That plaintiff is informed and believes, and therefore alleges, that the whole of said sum of $14,000.00 was not in fact paid, laid out or expended by said defendant, Daniel A. McColgan, in paying the amount due under the Deed of Trust first hereinbefore mentioned, or any liens alleged to be subsisting against said real property, but that a large amount of said sum of $14,000.00 has been retained by said Daniel A. McColgan contrary to and in violation of his agreement with plaintiff, as aforesaid, and that the amount so retained by said defendant, Daniel A. McColgan, can only be ascertained upon an accounting had of said defendant, Daniel A. McColgan.
>
> "That plaintiff alleges that there is justly due, owing and unpaid to him by said defendant, Daniel A. McColgan, as aforesaid, after deducting those charges which, upon an accounting herein, may be found to be proper items of debit, considerably more than the said sum of $2.455.00." (Paragraph VIII of Complaint in Lineker v. McColgan, No. 5344; Defendants' Exhibit "A", p. 16, Tr. in No. 3964, p. 90.)

The prayer of the complaint in *Lineker v. McColgan* (No. 5344) is:

(a) That a sale under the deed of trust dated September 2, 1914, be enjoined.

(b) That the defendant Daniel A. McColgan account to plaintiff for the proceeds of sale held on September 2, 1914.

The findings and judgment of the court in *Lineker v. McColgan* (No. 5344) were against the plaintiff and in favor of the defendants Daniel A. McColgan and R. McColgan on all the issues in the case. By that judgment it was adjudicated that the plaintiff was not entitled to an accounting of the proceeds of the sale held on September 2, 1914, and that the second deed of trust was given for a valuable consideration and was valid and binding upon the plaintiff.

In *Lineker v. McColgan* (No. 5344) the complaint also alleged the purchase by Daniel A. McColgan of a sheriff's certificate of sale made to one Crittendon and it was alleged that this purchase was made by Daniel A. McColgan under an alleged agreement that the purchase should be for the benefit of the plaintiff.

It was further contended in the trial court that under the terms of the deed of trust of June 20, 1910, Daniel A. McColgan could not purchase this certificate of sale for his own benefit.

The trial court found against both of these contentions and its findings and judgment were affirmed on appeal.

The complaint in the case at bar does not refer specifically to the purchase by Daniel A. McColgan of the Crittendon certificate of sale, but it is alleged that Daniel A. McColgan received and retained all of the proceeds of the sale held on September 2, 1914 (Complaint, Paragraphs XIX and XX, Tr. in No. 3964, pp. 13-14), and in the first special defense (Answer of these Defendants, p. 42, Tr. in No. 3964) the purchase of the Crittendon certificate of sale by D. A. McColgan is alleged.

The purchase of the Crittendon certificate of sale, by Daniel A. McColgan, and the subsequent execution of the sheriff's deed to him, are merely evidence that the plaintiffs were not entitled to an accounting of the proceeds of the sale held on September 2, 1914.

In *Lineker v. McColgan* (No. 5344) Fred V. Lineker as the successor in interest of Norvena Lineker, asserted that he was the owner of the equity in the property on September 2, 1914, the date it was sold for $14,000 under the deed of trust. (Defendants' Exhibit "A", p. 17; Tr. in No. 3964, p. 91.) And he further alleged that Daniel A. McColgan owed him, as the surplus proceeds of the sale, considerably more than the sum of $2455. *(Idem.)*

So that with reference to the first deed of trust the issues in *Lineker v. McColgan* (No. 5344) were these:

1. Was Fred V. Lineker the owner of the property, or the equity therein, at the time of the sale made on September 2, 1914?

2. Was Fred V. Lineker, the plaintiff, entitled to any part of the $14,000 received by Daniel A. McColgan as the proceeds of the sale made on September 2, 1914?

The complaint in *Lineker v. McColgan* (No. 5344) alleges that Norvena Lineker conveyed her interest in the property subject to the deed of trust to Fred V. Lineker, the plaintiff. (Paragraphs I and II of Complaint; Defendants' Exhibit "A", pp. 1-3; Tr. in No. 3964, p. 79.)

The complaint in *Lineker v. McColgan* (No. 5344) alleges:

> "Plaintiff alleges that the value of his equity in said real property is of far greater value than the amount alleged to be due to defendant Daniel A. McColgan, under and in accordance with the terms of said promissory note for $2455." (Defendants' Exhibit "A", p. 17; Tr. in No. 3964, p. 91.)

The answer of the defendants in *Lineker v. McColgan* (Paragraph X, Tr. in No. 3964, p. 108) contains the following denial:

> "Deny that said plaintiff has, or at any time since the 15th day of July, 1914, had any equity or interest or right, or title or estate whatsoever in or to said real property or any part thereof."

The trial court made the following finding of fact (Paragraph XIII of Findings; Defendants' Exhibit "A", p. 91; Tr. in No. 3964, p. 134):

> "That on said 2nd day of September, 1914, at the time of said sale, the said Daniel A. McColgan was the owner of said real property."

Paragraph VIII of the complaint in *Lineker v. McColgan* (No. 5344) contains the following allegation:

> "That plaintiff alleges that there is justly due, owing and unpaid to him by said defendant, Daniel A. McColgan, as aforesaid, after deducting those charges which, upon an accounting herein, may be found to be proper items of debit, considerably more than the said sum of $2,455". (Defendants' Exhibit "A", p. 17; Tr. in No. 3964, p. 91.)

This allegation is denied in Paragraph IX of the answer of the defendants. (Defendants' Exhibit "A", p. 34; Tr. in No. 3964, p. 107.)

It will be seen, therefore, that under the issues in *Lineker v. McColgan* (No. 5344) the plaintiff could introduce any evidence which would tend to show that he was the owner of the equity at the time of the sale and that he was entitled to any part of the $14,000 for which the property was sold.

Under these issues the plaintiff introduced in evidence the trust deed dated June 20, 1910, and contended that the purchase of the certificate of sale by Daniel A. McColgan on July 15, 1914, was made in pursuance of the terms of the deed of trust and that the purchase of the certificate of sale did not constitute Daniel A. McColgan the owner of the property. If the deed of trust bore such construction the plaintiff would have prevailed on the issue of ownership on September 2, 1914.

So with reference to the issue as to whether any money was due plaintiff from Daniel A. McColgan as the surplus proceeds of the sale made on September 2, 1914, it was competent for the plaintiff to show any fact which would support the plaintiff's side of this issue. The deed of trust was proper evidence, and if it was subject to the construction contended for by plaintiff, it would have entitled plaintiff to a finding in his favor on that issue.

But these issues were determined in favor of the defendants, and the court found that Daniel A. McColgan was the owner of the property on September 2, 1914, and that the plaintiff was not entitled to any part of the proceeds of the sale.

Both in the trial court and in the District Court of Appeal, the plaintiff Fred V. Lineker contended that the deeds of trust entitled him to a finding that he was the owner of the property on September 2, 1914.

At the trial Mr. Dennett, the plaintiff's attorney, testified as follows, as a witness for the plaintiff:

> "I may have been incorrect in my assumption of the law, but I assumed whatever the trustee took would be taken in the benefit of the beneficiary, that is one reason I didn't worry about it. When we took up any of those claims, I assumed as a matter of law that he of necessity took them for the benefit of the beneficiary under the deed of trust." (Printed copy Bill of Exceptions in Lineker v. McColgan (No. 5344); p. 143 Defendants' Exhibit "E", erroneously marked Plaintiff's Exhibit "E".)

The following are quotations from Appellant's Opening Points and Authorities in the higher courts (Defendants' Exhibit "D"):

> "Respondent D. A. McColgan was bound by the terms of the deed of trust under date of June 20, 1910, as to his purchase of the Crittenden certificate of sale and disposition of the surplus from the trustee's sale." (P. 5.)
>
> "The appellant contends that the evidence adduced at the trial is insufficient to justify the findings of the trial court, and particularly in the first place that finding which stated that the respondent, Daniel A. McColgan, had purchased and acquired from William C. Crittenden all the right, title and interest of said William C. Crittenden in and to said real property, and in and to said certificate of sale for his own use and benefit, and with his own money. (Trans. folio 230.) Appellant claims that according to the terms of the deed of trust under date of June 20, 1910, that Daniel A. McColgan could not go out and purchase for his own use and benefit the Crittenden certificate of sale for the reason that this certificate of sale evidenced a lien subsisting upon the real property affected by said deed of trust and as such was a lien subsisting against said real property at a date subsequent to the execution of the deed of trust but still being one of the class of liens mentioned in said deed of trust. (Trans. folio 559.)
>
> The deed of trust in question is set forth fully as Appellant's Exhibit 2-A (Trans. folio 551 et seq.)." (P. 5.)
>
> "The deed of trust under date of June 20, 1910 (Trans. folio 551 et seq.), was not executed simply to secure the payment of the original note nor to secure any note as such, but secured the debt, the note being merely evidence of the debt. All of the disbursements made by

> Daniel A. McColgan as the third party to the deed of trust are expressly authorized to be made by him and to become part of the debt due him and are therefore fully covered by the provisions of the deed of trust." (P. 8.)
>
> "This is so obvious from the terms of the deed of trust, that it would seem that no argument was necessary to prove the same, but when this same point was argued before the trial court its only comment was that 'it would be a very forced construction of the terms of the deed of trust in question.' " (P. 8.)
>
> "The conclusion of law made by the trial court that respondent, Daniel A. McColgan, was, on the date of sale held under the terms of the deed of trust here in question the owner of the real property affected by said deed of trust (Trans. folio 185) is based upon its finding that Daniel A. McColgan purchased the Crittenden certificate of sale for his own use and benefit. Appellant contends that by the very terms of the deed of trust itself, respondent, Daniel A. McColgan, could not have purchased the Crittenden certificate of sale for his own use and benefit so that the conclusion of law made by the trial court that on the date of the sale said McColgan was the owner of the property in question, must likewise fall." (P. 9.)

Counsel for appellant in their appeal in *Lineker v. McColgan* (No. 5344) referred to the finding of ownership by McColgan as a conclusion of law. As we have seen, it is a finding of fact and appears in the findings (Paragraph XIII of Findings; Defendants' Exhibit "A", p. 91; Tr. in No. 3964, p. 134). As far, however, as the doctrine of *res judi-*

cata is concerned, it would make no difference whether it is a conclusion of fact or law.

At page 26 of appellants' brief the following statement is made:

> "It is the appellant's contention that the only issue actually tried and litigated in the Superior Court in action No. 5433 was whether Daniel A. McColgan had entered into an oral agreement with the plaintiff to purchase the Crittendon certificate of sale for the benefit of Lineker himself and that none of the rights of Norvena Lineker were involved in that action."

The complaint in *Lineker v. McColgan* (No. 5344) alleged that the plaintiff was the owner of the property which had been sold on September 2, 1914, under the first deed of trust, and sought an accounting of the alleged surplus arising from that sale. The complaint also alleged that the surplus proceeds of the sale under the first deed of trust exceeded the amount of the second deed of trust for $2455. Both Daniel A. McColgan, and R. McColgan, the trustee under the first deed of trust, were parties defendant as was also Eustace Cullinan, who, with R. McColgan, was a trustee under the second deed of trust. In *Lineker v. McColgan* (No. 5344) there was presented to the court every question which can possibly arise in the case at bar, *both with reference to the alleged surplus arising from the first sale and to the validity of the second deed of trust for $2455.*

In Paragraph V of the complaint in *Lineker v. McColgan* (No. 5344) (pp. 7, 8, 9, Defendants' Exhibit "A"; pp. 83-84 Tr. in No. 3964), the plaintiff alleged that Daniel A. McColgan purchased the Crittendon certificate of sale, pursuant to an agreement that he would purchase it, for the benefit of plaintiff, *but this paragraph of the complaint could have been omitted entirely and the complaint would nevertheless state a cause of action for an accounting of the surplus proceeds of the sale held on September 2, 1914.*

The purchase of the Crittendon certificate of sale by Daniel A. McColgan, and the subsequent execution of the sheriff's deed to him, were merely evidence that the plaintiffs were not entitled to an accounting of the proceeds of the sale held on September 2, 1914.

In *Lineker v. McColgan* (No. 5344) Fred V. Lineker, as the successor in interest of Norvena Lineker, asserted that he was the owner of the equity in the property on September 2, 1914, the date it was sold for $14,000 under the deed of trust. And he further alleged that Daniel A. McColgan owed him, as the surplus proceeds of the sale, considerably more than the sum of $2455.

So as already pointed out, *supra,* the issues in Case No. 5344 with reference to the first deed of trust were these:

> 1. Was Fred V. Lineker the owner of the property or the equity therein at the time of the sale made on September 2, 1914?

2. Was Fred V. Lineker, the plaintiff, entitled to any part of the $14,000 received by Daniel A. McColgan as the proceeds of the sale made on September 2, 1914?

Under the issues in *Lineker v. McColgan* (No. 5344) the plaintiff could introduce any evidence which would tend to show that he was the owner of the equity at the time of the sale and that he was entitled to any part of the $14,000 for which the property was sold.

Under these issues the plaintiff introduced in evidence the first deed of trust, viz., trust deed dated June 20, 1910 (Bill of Exceptions in *Lineker v. McColgan,* Defendants' Exhibit "E", p. 184), and contended that the purchase of the certificate of sale by Daniel A. McColgan on July 15, 1914, was made in pursuance of the terms of the deed of trust and that said purchase did not constitute Daniel A. McColgan the owner of the property (Plaintiff's Trial Brief, Exhibit "F", p. 4). If the deed of trust bore this construction, the plaintiff would have prevailed on the issue of ownership on September 2, 1914.

Not only was the trust deed admissible in evidence under the allegations quoted above, but it was also admissible under the following allegation which occurs at the end of Paragraph V of the complaint. (Complaint in *Lineker v. McColgan,* Defendants' Exhibit "A", p. 10; Tr. in No. 3964, p. 86.)

> "That in the purchase of said judgment and certificate of sale last as aforesaid said defendant, Daniel A. McColgan, well knew that he was acting therein in accordance with his agreement with plaintiff to that end, *and also that said purchase last aforesaid was made by said defendant, Daniel A. McColgan, for the use and benefit of plaintiff.*"

Under this allegation also the plaintiff was entitled to prove both the alleged oral promise and also to introduce in evidence the deed of trust and to maintain that by its terms the purchase of the Crittendon certificate enured to his benefit.

With reference to the issue as to whether any money was due plaintiff from Daniel A. McColgan as the surplus proceeds of the sale made on September 2, 1914, it was competent for the plaintiff to show any fact which would support the plaintiff's side of this issue. The deed of trust was proper evidence and if it was subject to the construction contended for by plaintiff, it would have entitled plaintiff to a finding in his favor on that issue.

But these issues were determined in favor of the defendant, and the court found that Daniel A. McColgan was the owner of the property on September 2, 1914, and that the plaintiff was not entitled to any part of the proceeds of the sale.

Paragraph III of the complaint which preceded the Paragraph V (containing the allegations regarding the purchase of the Crittendon certificate of sale) is as follows (Judgment Roll in *Lineker v.*

McColgan, Exhibit "A", p. 4; Tr. in No. 3964, p. 80):

"That after said notice of sale had been given in the manner prescribed by said Deed of Trust, and prior to the sale of said real property as hereinbefore mentioned, plaintiff and defendant, Daniel A. McColgan, made and entered into an agreement wherein and whereby they agreed that plaintiff would purchase said real property at said sale for a sum of money sufficient in amount to pay the amount which said defendant, Daniel A. McColgan, claimed to be due to him from said Norvena E. S. Lineker, and expenses of said sale, and any other liens subsisting against said real property not secured by said Deed of Trust.

That at that time plaintiff made a formal demand upon said defendant, Daniel A. McColgan, that he render an account of the amount claimed to be due to him by said Norvena E. S. Lineker, but that said defendant, Daniel A. McColgan, refused to render any such account, though he then and there informed plaintiff that the said real property should be sold for the sum of $10,000.00, and which sum he informed plaintiff would be sufficient to repay the amount claimed to be due to him by said Norvena E. S. Lineker, including the expenses of said sale, and also any other alleged liens subsisting against said real property, but not secured by said Deed of Trust.

That thereupon plaintiff and said defendant, Daniel A. McColgan, further agreed that plaintiff would bid the sum of $10,000 for said real property at said sale, but upon the further understanding and agreement with said defendant, Daniel A. McColgan, that out of the proceeds of said sale coming into the hands of said last-named defendant from said trustee in the manner hereinafter alleged, he, said Daniel A. McColgan, would not pay, or cause to be

paid, any of said alleged liens, until the same had been judicially determined to be valid and subsisting liens against said real property, and upon the further understanding that said defendant, Daniel A. McColgan, would account to plaintiff for all moneys coming into his hands as the proceeds of said sale."

Paragraph VIII of the complaint in Action No. 5344 (p. 16 of Judgment Roll, Exhibit "A"; p. 90 of Tr. in No. 3964) is as follows:

"Plaintiff has repeatedly requested and demanded of said defendant, Daniel A. McColgan, that he render an account of the said sum of $14,000.00, and that he pay plaintiff such a sum as, upon accounting, might appear to be justly due to him, but said defendant, Daniel A. McColgan, wholly refuses and declines, and does still refuse and decline, to render any account of said sum of $14,000.00, or to pay to plaintiff the sum which is justly due or owing to him, in accordance with the agreement to that end had by and between plaintiff and defendant, Daniel A. McColgan.

That plaintiff is informed and believes, and therefore alleges, that the whole of said sum of $14,000.00 was not in fact paid, laid out or expended by said defendant, Daniel A. McColgan, in paying the amount due under the deed of trust first hereinbefore mentioned, or any liens alleged to be subsisting against said real property, but that a large amount of said sum of $14,000.00 has been retained by said Daniel A. McColgan contrary to and in violation of his agreement with plaintiff, as aforesaid, and that the amount so retained by said defendant, Daniel A. McColgan, can only be ascertained upon an accounting had of said defendant, Daniel A. McColgan.

That plaintiff alleges that there is justly due, owing and unpaid to him by said defendant,

> Daniel A. McColgan, as aforesaid, after deducting those charges which, upon an accounting herein, may be found to be proper items of debit, considerably more than the said sum of $2,455.00."

It will be seen, therefore, that under the issues in *Lineker v. McColgan* (No. 5344), the plaintiff was entitled to prove any fact showing that he was entitled to a part of the sum of $14,000 for which the property was sold on September 2, 1914.

The first deed of trust was introduced in evidence in *Lineker v. McColgan* (No. 5344) and both in the trial court and in the appellate court the plaintiff contended that under its terms Daniel A. McColgan could not purchase the Crittendon certificate of sale and hold it adversely to plaintiff.

This contention was urged at great length before the trial court. (See plaintiff's trial briefs introduced in evidence, Defendant's Exhibits F, G and H.) And in the appellate court the same contention was made. We have already quoted at length from the appellant's brief in the District Court of Appeal on this point.

Appellants' brief before this court contains quotations from the defendants' brief in the District Court of Appeal, where it is contended that the only matter before the court was the alleged oral agreement regarding the purchase of the Crittenden certificate of sale and that the construction of the deed of trust was not before the court.

But the appellate court in its decision ignored the respondents' contention and decided on the merits the contentions made by Lineker based on the deed of trust.

Obviously the contention referred to by counsel for appellants is wholly immaterial for it was ignored by the District Court of Appeal and Lineker's contentions decided on their merits.

In the trial court, likewise, Lineker's contentions based on the deed of trust were decided on the merits. This is shown by the judgment itself and also by the following excerpt from Lineker's brief in the appellate court, Exhibit "D" (page 8):

> "When this same point was argued before the trial court its only comment was 'it would be a very forced construction of the terms of the deed of trust in question'."

It will be seen, therefore, that the contention was decided on the merits by the trial court and by the appellate court, and that the statement in appellants' brief herein to the effect that the only issue "actually tried" in *Lineker v. McColgan* was as to existence of the alleged oral agreement is wholly unsupported by the record.

Even if the contention advanced by Lineker regarding the deed of trust had not been strictly within the issues raised by the pleadings, such contention was, in fact, made and determined both by the trial court and by the appellate court and it is *res judicata*.

What the plaintiffs are seeking in the case at bar is the same thing that the plaintiff Lineker sought in the action of *Lineker v. McColgan* (No. 5344) viz., the money which it is claimed was due as the surplus proceeds of the sale held on September 2, 1914. The only allegation of the complaint in the case at bar which attempts to state a cause of action for this money is contained in Paragraphs X and XIX of the complaint in the case at bar.

Paragraph X of the complaint in the case at bar contains the following allegations:

> "That shortly prior to the said sale, the said defendants *Daniel A. McColgan* and R. McColgan, advised the plaintiff, *Frederick V. Lineker,* that he ought to bid for said property at said sale at least the sum of fourteen thousand dollars ($14,000.00), and that it would make little or no real difference in the final settlement of the accounts between the plaintiffs and said Daniel A. McColgan and R. McColgan, how much the plaintiffs bid for said property, for the reason that the plaintiffs would only have to pay to the defendants Daniel A. McColgan and R. McColgan what was justly due under said deed of trust dated June 20th, 1910, and that all sums in excess of such amount for which the property might be sold, would be accounted for to the said plaintiffs by said defendants, Daniel A. McColgan and R. McColgan, and turned over to the plaintiffs by said defendant, R. McColgan." (Tr. in No. 3964, p. 6.)

Paragraph XIX of the complaint in the case at bar contains the following allegations:

> "That on the 2nd day of September, 1914, the said *Daniel A. McColgan* received from said *Annie Connors* the sum of thirteen thousand dollars ($13,000.00), which sum was greatly in excess of all moneys due or owing to him from the plaintiffs, or either of them;" (Tr. in No. 3964, p. 13.)

The most casual comparison of the above quoted allegations from the complaint in the case at bar with the allegations of the complaint in *Lineker v. McColgan* (No. 5344) will show that the same claim is asserted in both actions.

The trial briefs which are in evidence also clearly show that at the trial of the action of *Lineker v. McColgan* (No. 5344) the plaintiff claimed that under the terms of the deed of trust the purchase of the Crittendon certificate of sale enured to Lineker's benefit. This contention was wholly independent of the contention based on the oral agreement.

At page 3 of one of the trial briefs (Defendant's Exhibit "F") the following statement is made:

> Defendant, Daniel A. McColgan claims the residue of the trustee's sale by virtue of the Sheriff's deed under the Williams (Crittendon) judgment but plaintiff herein demands the same not only under the terms and provisions of the deed of trust of June 20, 1910, but in accordance with the terms of the agreement had with defendant, Daniel A. McColgan by his attorney, L. L. Dennett, in accordance with which, as plaintiff claims, said Daniel A. McColgan purchased the Crittendon Certificate of Sale for his use and benefit.

In fact this was the primary contention made by Lineker at the trial. Point "one" of the written argument in the trial brief (Defendant's Exhibit "F") is as follows:

> *Point One.* Defendant D. A. McColgan is bound by the deed of trust under date of June 20, 1910, as to his purchase of the Crittendon certificate of sale and disposition of the surplus from the trustee's sale.

The argument based on this contention consumes the first eleven pages of the brief. Point "two" which commences at page eleven refers to the alleged oral agreement. The other trial briefs in the case also clearly show the same matter but it would be superfluous to refer to them.

At the trial of *Lineker v. McColgan* (No. 5344) the plaintiff's attorney made the following statement:

> "The whole issue in this case is: Is there to be a surplus fund between the plaintiff here and the defendant here. The moneys here came into the defendant's hands from the trustee; he admits receiving the sum of $14,000; there is excess money, which money we claim." (p. 156 of Bill of Exceptions, Defendant's Exhibit "E".)

The attorney for the plaintiff at the trial also made the following statement:

> "I may have been incorrect in my assumption of the law, but I assumed whatever the trustee took would be taken in the benefit of the beneficiary, that is one reason I didn't worry about it. When we took up any of those

> claims, I assumed as a matter of law that he of necessity took them for the benefit of the beneficiary under the deed of trust." (Bill of Exceptions, p. 143, Defendant's Exhibit "E".)

At page 37 of appellants' brief the following statement is made:

> Certainly any reasonably close examination of the judgment roll and of the bill of exceptions in action No. 5344 will reveal that the existence or non-existence of a consideration for the deed of trust in the sum of $2455.00 was at no time in issue.

By paragraph IV of the complaint in *Lineker v. McColgan* (No. 5344) it is alleged that deed of trust for $2455 was made for the purpose of securing defendant Daniel A. McColgan in event he should pay any of certain liens on the real property. (Exhibit "A", p. 6, Tr. in No. 3964, p. 82.)

In paragraph VI of the complaint it is alleged that said sum of $2455 was loaned to said defendants R. S. Marshall for the use and benefit of plaintiff and at plaintiff's special instances and request. (Defendant's Exhibit "A", p. 13, Tr. in No. 3964, p. 88.)

At paragraph VIII of the complaint in *Lineker v. McColgan* (No. 5344) it is alleged that the amount due to Lineker after an accounting of the proceeds of the sale of September 2, 1914, is considerably more than the amount of the said deed of trust for $2455.00. (Defendant's Exhibit "A", p. 17, Tr. in No. 3964, p. 91.) In paragraph IX of the com-

plaint this allegation is repeated. (Page 17, Exhibit "A".)

Clearly there was put an issue by the complaint in this action the question as to the consideration of the deed of trust for $2455.00 and the finding of the trial court as to what the consideration was, was clearly within the issues. The trial court found the exact consideration for the note and deed of trust for $2455.00. This is contained in paragraph IX of the findings at page 81 of the judgment roll. (Defendant's Exhibit "A", p. 81, Tr. in No. 3964, p. 126.) The court found that the consideration for this note and deed of trust was the sum of $2455.00 loaned by Daniel A. McColgan to R. S. Marshall as the agent and trustee for Lineker. This finding was clearly within the issues and adjudicated any question as to the consideration for and validity of the note and deed of trust for $2455.00.

In the judgment roll two sets of findings appear. One set of findings was made at the first trial and the other set was made at the second trial of the case. Possibly counsel have omitted to read the findings made after the second trial.

At page 26 and at other places in appellant's brief the statement is made that at the trial of the action of *Lineker v. McColgan* (No. 5344) the attorney for Lineker "abandoned" certain matters. This assertion is based upon the following statement made by Lineker's attorney at the trial:

> "We might state here, if your Honor please, in view of the turn this case has now taken, that these questions as to the purchase of this property by the Marshalls, and matters relative to the second deed of trust, $2455.00 deed of trust, might be immaterial to—irrelevant to our present action, but there is nothing in there about it being part of the agreement, but, however, it is rather immaterial, I think. The crux of the matter is getting back to the agreement had between Daniel A. McColgan and the plaintiff as to the sale." (Defendant's Exhibit "E", p. 101.)

Obviously Lineker's attorney by the foregoing statement *abandoned nothing.* The trial briefs and the briefs in the appellate court clearly show that the plaintiff at all times insisted that under the terms of the deed of trust the purchase of the Crittendon certificate of sale enured to Lineker's benefit.

At page 38 of appellants' brief the statement is made that counsel at the trial of *Lineker v. McColgan* (No. 5344) "specifically and clearly withdrew and abandoned all matters in complaint concerning the rights of any of the parties with reference to or pertaining to said deed of trust for $2455.00 thereby eliminating them from the case. This statement in appellant's brief is based upon the statement made by the attorney for Lineker at the trial appearing at page 26 of appellants' brief and quoted above. The statement made in appellants' brief is obviously erroneous.

At page 35 of appellants' brief the following statement is made:

> "Furthermore, even if it be conceded, for the sake of argument, that the right of Daniel A. McColgan to purchase the Crittendon certificate in hostility to Frederick V. Lineker has passed into the realm of adjudicated issues, it still remains the fact that McColgan's right to purchase that certificate in hostility to Norvena Lineker has never been passed upon."

This same contention was made in the trial court before Judge Rudkin. Obviously it is unsound. The action of *Lineker v. McColgan* (No. 5344) was prosecuted by Lineker as the alleged owner of the real property and as the successor in interest of his wife, Norvena Lineker. Since that action was commenced he has re-conveyed the property to his wife. She is bound by the judgment in the same way as she would be bound had she been the plaintiff herself.

In the action of *Lineker v. McColgan* (No. 5344) Fred V. Lineker, as the grantee of Norvena Lineker, his wife, was entitled to the surplus proceeds of the sale.

Buttrick v. Wentworth, 6. Allen 79 (Mass.);
Johnson v. Wilson, 77 Mo. 639;
Reid v. Mullins, 91 S. W. 523 (Mo.).

Counsel for appellants say that it is admitted to be a fact that counsel for both sides "in the District Court of Appeal" discussed at considerable length the proposition that under the terms of the deed

of trust Daniel A. McColgan was prohibited from purchasing the Crittendon certificate of sale in hostility to Lineker. Counsel for appellants then say "the only question of fact actually litigated was concerning the existence of the oral agreement".

As already pointed out this matter was the primary point discussed both in the trial court and in the District Court of Appeal.

In determining whether or not there has been a prior adjudication of a cause of action questions of law are just as important as questions of fact. This question of law was urged by Lineker's attorney both in the trial court and in the District Court of Appeal.

If the plaintiff had prevailed in *Lineker v. McColgan* (No. 5344) the judgment would have been that McColgan pay him the surplus proceeds of the sale. In the case at bar if the plaintiff prevailed the judgment would be for the same surplus. This shows the absolute identity of the causes of action. If appellants' contentions here made were sound the plaintiff could recover two judgments.

Mr. *Chand* says at page 52-A:

> "Could the former suit and the present suit proceed *pari passu* to judgment? If not then the judgment in one is a bar to the other."

Let us suppose that the court in *Lineker v. McColgan* (No. 5344) had found against Lineker on the issue as to the alleged oral agreement to purchase the certificate of sale for Lineker's benefit,

but had, nevertheless, held that Lineker was entitled to the surplus, based upon the construction of the deed of trust contended for by Lineker, and that this judgment had been affirmed on appeal. Could it possibly be maintained that such judgment would not be *res judicata* in favor of Lineker?

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2. BY VIRTUE OF THE CRITTENDON CERTIFICATE OF SALE AND THE SHERIFF'S DEED MADE IN PURSUANCE THEREOF DANIEL A. McCOLGAN WAS ENTITLED TO THE SURPLUS PROCEEDS OF THE SALE MADE UNDER THE DEED OF TRUST. THE CASE OF WEBER v. McCLEVERTY, 149 CAL. 316, HOLDS NOTHING TO THE CONTRARY.

Counsel for appellants have made a very fanciful argument based on the case of *Weber v. McCleverty,* 149 Cal. 316. After citing this case and after stating that Daniel A. McColgan "did not acquire an equity of redemption in these lands by reason of his purchase of the Crittendon certificate of sale" counsel ask how the lower court could be correct in making the following statement in its opinion, viz.:

> "First, that under the execution sale and sheriff's deed, McColgan acquired the equity of redemption in the lands in controversy, in his own right, and became entitled to receive and retain for his own use and benefit all proceeds of the sale under the trust deed above

> the indebtedness secured thereby, to which the plaintiff would otherwise have been entitled." (Tr. p. 30.)

Both Judge Rudkin and the judges of the District Court of Appeal in *Lineker v. McColgan* (No. 5344) employed the term "equity of redemption" in its popular rather than its technical sense. There is, of course, no redemption from a sale under a deed of trust but the trustor and his successors in interest have at least an "equity" in the property.

The most cursory examination of the case of *Weber v. McCleverty,* 149 Cal. 320, supra, and the other cases cited by appellants will disclose that they offer no support to appellants' contention.

They decide merely that a deed of trust is not a "lien" or "encumbrance" within the meaning of section 1475 of the Code of Civil Procedure which provides that if there be subsisting liens or encumbrances on a homestead the claims secured thereby must be presented to and satisfied out of the debtor's estate before resort is had to the real property covered by the homestead.

The nature of a deed of trust has been described by the Supreme Court of California, in a decision subsequent to *Weber v. McCleverty,* in which the distinction is made between a trust deed, and a deed absolute in form but given really as security. See *McLeod v. Moran,* 153 Cal. 97, in which the court says:

> "A trust-deed of the kind here involved differs from such a deed only in that it conveys

the legal title to the trustees so far as may be necessary to the execution of the trust. It carries none of the incidents of ownership of the property, other than the right to convey upon default on the part of the debtor in the payment of his debt. The nature of such an instrument has been extensively discussed by this court, and the sum and substance of such discussion is that while the legal title passes thereunder, and the trustees cannot be held to hold a mere 'lien' on the property, it is practically and substantially only a mortgage with power of sale. (See Sacramento Bank v. Alcorn, 121 Cal. 379, 383 (53 Pac. 813); Tyler v. Currier, 147 Cal. 31, 36 (81 Pac. 319); Weber v. McCleverty, 149 Cal. 316, 320 (86 Pac. 706).) The legal title is conveyed solely for the purpose of security, leaving in the trustor or his successors a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them. (Civ. Code, secs. 865, 866.) Except as to the trustees and those holding under them, the trustor or his successor is treated by our law as the holder of the legal title. (King v. Gotz, 70 Cal. 236 (11 Pac. 656).) The legal estate thus left in the trustor or his successors entitles them to the possession of the property until their rights have been fully divested by a conveyance made by the trustees in the lawful execution of their trust, and entitles them to exercise all the ordinary incidents of ownership in regard to the property, subject always, of course, to the execution of the trust. This estate is a sufficient basis for a valid claim of homestead. It was expressly held in King v. Gotz, 70 Cal. 236 (11 Pac. 656), that the trustor may select as a homestead property covered by such a trust-deed. The estate of the trustees absolutely ceases upon the payment of the debt (Civ. Code, sec. 871), leaving the whole title in the grantor

> in whom it was vested at the execution of the trust-deed, or his successors, and leaving nothing in the trustees except the bare legal title of record, which they can be compelled to reconvey to the owner simply to make the record title clear. Tyler v. Currier, 147 Cal. 31, 36 (81 Pac. 319).)"

Substantially to the same effect are:

Tyler v. Currier, 147 Cal. 31;

Duncan v. Wolfer, 39 Cal. App Dec. 636, 212 Pac. 390;

King v. Gotz, 70 Cal. 236.

That a trustor's interest in land subject to a deed of trust may be taken by execution sale has been expressly held in

Kennedy v. Nunan, 52 Cal. 326.

Sec. 865 of the Civil Code says:

> "The grantee or devisee of real property subject to a trust acquires a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them."

The $14,000 was the sale price of the land which McColgan (as successor to the Linekers) then owned subject to the first deed of trust. After satisfying the debt secured by that deed of trust, the trustees were bound to pay the balance of the $14,000 to the owner of the land, Daniel A. McColgan. It has been held expressly that the surplus remaining after sale by trustees in such cases belongs to the successor of the original trustor.

In *Lineker v. McColgan,* 54 Cal. App. 771-775, the court said:

> "On acquiring plaintiff's equity of redemption by the sheriff's deed, Daniel A. McColgan, for the protection of his title so acquired against the intermediate liens, caused the land to be sold under the trust deed. Having acquired the plaintiff's title by the sheriff's deed, McColgan was entitled to receive and retain for his own use and benefit all the proceeds of the sale under the trust deed above the indebtedness secured thereby to which plaintiff would otherwise have been entitled. The question of intermediate lien holders' rights to share in such surplus is not involved in this action."

See also,

Williams v. Pratt, 10 Cal. App. 625.

But even if there was anything of merit in appellant's contention it would be wholly immaterial here as that matter was forever set at rest, as far as this litigation is concerned by the judgment in *Lineker v. McColgan* (No. 5344).

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3. THE JUDGMENT IN THE ACTION OF MARSHALL v McCOLGAN (No. 5353) IS LIKEWISE A PRIOR ADJUDICATION OF THE CAUSE OF ACTION IN THIS SUIT.

Equally with the judgment in *Lineker v. McColgan* (No. 5344) the judgment in *Marshall v.*

McColgan (No. 5353) is a complete adjudication of the cause of action herein sued upon. I am informed by Mr. Cullinan that in his brief herein he will discuss this point in full. Therefore, in order to save repetition, I will make but the briefest reference to the matter here.

The complaint in the case at bar shows that R. S. Marshall was the agent and trustee for the Linekers. They are therefore privies to any judgment rendered for or against him.

The insinuation that the judgment in *Marshall v. McColgan* was collusive is not only wholly irrelevant but is absolutely without foundation in fact.

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4. **THE JUDGMENT IN LINEKER v. McCOLGAN (No. 5344) IS ALSO AN ADJUDICATION IN FAVOR OF THESE DEFENDANTS OF THE SECOND SPECIAL DEFENSE PLEADED IN THIS ANSWER.**

Moreover, the judgment in *Lineker v. McColgan* (No. 5344) is also an adjudication in favor of these defendants of the second special defense set up in their answer in the case at bar (Tr. in No. 3964, p. 55). In this special defense, it is alleged that on September 2, 1914 (the date of the sale under the first deed of trust and the date of the new note and deed of trust for $2455), there was a stating of an account between Frederick Lineker and Daniel A. McColgan, under which it was then agreed that nothing was owing to Lineker and that Lineker owed Daniel A. McColgan $2455.

In *Lineker v. McColgan* (No. 5344) the court found that the giving of the new note and deed of trust for $2455 constituted an account stated. (Finding X at p. 87 of Defendants' Exhibit "A", Tr. in No. 3904, p. 121.)

In the decision of the District Court of Appeal (page 561 of opinion forming a part of remittitur, Defendants' Exhibit "B"), the court said:

> "The court further found that, at the time the note for $2,455 and the second trust deed were executed, such note 'was intended by said Fred. V. Lineker and by said Daniel A. McColgan to be and was in fact an account stated between' them, and 'was intended to be and was in fact a final accounting * * * of all debts and financial transactions between them up to the time of said execution of said promissory note.' Since there is evidence to support the findings they are conclusive on appeal."

A former adjudication in regard to an affirmative defense to an action is as effective as a plea of *res judicata* as is a former adjudication against the plaintiff on some matter contained in the plaintiff's complaint.

In *Williams v. MacDonald,* 180 Cal. 547, the Supreme Court said:

> "if the judgment-roll shows that the judgment did go to the merits of the second action, either in regard to some matter which the plaintiff must make out in order to entitle him to a recovery, *or in regard to some affirmative defense, which is a defense to the second action as well as to the first, then the judgment is a bar.* (Toomy v. Hale, 100 Cal. 172, (34 Pac. 644); Reed v. Cross, 116 Cal. 473, 485, (48 Pac. 491);

Green v. Thornton, 130 Cal. 482, (62 Pac. 750); Lamb v. Wahlenmaier, 144 Cal. 91, (103 Am. St. Rep. 66, 77 Pac. 765); Koehler v. Holt etc. Co., 146 Cal. 335, (80 Pac. 73); Estate of Harrington, 147 Cal. 124, (109 Am. St. Rep. 118, 81 Pac. 546).)"

The question of law as to the sufficiency of the facts upon which was based the finding of an account stated is not open to inquiry in the case at bar. However, the cases of *Bledsoe v. Stuckey,* 31 Cal. App. Dec. 1054, and *Kinley v. Thelen,* 158 Cal. 175, fully justify the finding. Both these cases hold that the giving of a new note under the circumstances shown by the pleadings in the case at bar constituted an account stated between the parties, and that they cannot, in the absence of a chargee of fraud or mistake, be permitted to reopen questions which were then closed.

Even if the issues presented by the complaint in the case at bar had not been determined adversely to plaintiffs in *Lineker v. McColgan* (No. 5344) the affirmative defense of an account stated, which was in that action adjudicated in favor of the defendants, is a complete adjudication of the validity of that defense in the case at bar, for the matters there adjudicated are a defense to both actions. This is shown by the decision in *Williams v. MacDonald,* 180 Cal. 546, where the second action was on a different contract than the first action. In that case the defendant pleaded an affirmative defense to the contract counted upon in the first action and judgment was rendered in his favor on

this defense. It was held that this adjudication was conclusive of the same defense pleaded to the second action, although the second action was for a different cause of action.

The matter is covered also by the decision of the Supreme Court of the United States in *S. P. Co. v. U. S.*, 168 U. S. 48, where the second action was for an entirely different cause of action from the first action. The court said:

> "A right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction * * * cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action."

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5. APPELLEES' AUTHORITIES.

In *Southern Pacific Co. v. U.S.*, 168 U. S. 48, the Supreme Court said:

> "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first

> suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

In *Davis v. Brown,* 94 U. S. 428, the court said (p. 428):

> "The judgment is not only conclusive as to what was actually determined respecting such demand, but as to every matter which might have been brought forward and determined respecting it."

To the same effect is

Dowell v. Applegate, 152 U. S. 343.

When records of former judgment appear conclusive trial is at an end and no evidence should be received.

Packet Co. v. Sickles, 5 Wall. 593, 594.

Even when the second suit is for a different cause of action the former adjudication of a matter of fact or law is equally conclusive.

In *Cromwell v. Sac. County,* 94 U. S. 351, the Supreme Court said:

> "that a judgment upon the merits constitutes an absolute bar to a subsequent suit upon the

> same cause of action in respect to every matter offered and received in evidence, or which might have been offered to sustain or defend the claim in controversy, while if the second action is upon a different claim or demand the judgment in the prior action operates as an estoppel, only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered, the inquiry in such case being 'as to the point or question actually litigated and determined in said action, not what might have been litigated or determined.' "

In *New Orleans v. Citizens etc.,* 167 U. S. 396, the Supreme Court said:

> "The estoppel resulting from the judgment does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment."

In *Bank v. Beverley,* 1 How. 139 (cited in 167 U. S. 396), it was held that the construction of a will affecting the right of parties must govern in subsequent controversies between the parties and their privies without reference to the different nature of the demands.

So where construction of contract is in controversy, such construction will bind parties in all future disputes.

Tioga v. Blossberg, 20 Wall. 137;
Mason v. Buchtel, 101 U. S. 638.

The following cases illustrate the rule that in order to support an estoppel, it is sufficient if the matters involved in the former action were substantially the same as those in the present action, and the rule that if a claim or defense might have been litigated in the former suit the judgment there is an estoppel although the claim or defense was not in fact litigated therein.

> "A record produced to support a plea of res judicata should be of a judgment in a suit in which the causes of action subsequently sued upon might have been proved."

Athearn v. Brarman, 8 Blackf. 440 (Ind.);
Marsh v. Masterson, 50 N. Y. Super. Ct. 187; affirmed 101 N. Y. 501.

Judgment in action to compel reconveyance to plaintiff on ground that defendant had failed to apply the rents and profits to plaintiff's benefit as it was alleged he had agreed to do, is bar to subsequent action against same defendant in which she alleged that defendant had failed to perform a contract to support plaintiff out of the rents in consideration of the conveyance.

Wolverton v. Baker, 98 Cal. 628.

Judgment for defendant in action for malicious prosecution is bar to subsequent suit against defendant for slander for the same accusation as the one on which he was arrested, although slander was uttered on a different occasion, but before suit for malicious prosecution was filed.

Tidwell v. Weatherspoon, 58 Am. Rep. 665 (Fla.).

Judgment rendered in favor of defendant in action for specific performance is bar to action to reform the contract and enforce it as reformed.

Thomas v. Joslyn, 36 Minn. 1 (29 N. W. 344).

A sued on note given for the price of sheep. The defense was that the sheep were diseased. Judgment was for plaintiff. Subsequently B sued A for breach of warranty in the sale of the sheep, charging that they were diseased. Held first judgment a bar.

Ehle v. Bingham, 7 Barb. 494.

Although case made by bill as to the details of the transaction and the matters of evidence of fraud differed from the case tried in the former suit, the gravamen of the case was the same in each and the judgment in the former suit was *res judicata.*

Oglesly v. Atrell, 20 Fed. 570.

In *Stockton v. Ford,* 59 U. S. 418 (18 Howard) the Supreme Court said:

> "One of the questions now sought to be agitated again is precisely the same as this one in the previous suit; namely, the right of the plaintiff to the judicial mortgage under the execution and sale against Prior. The other is somewhat varied; namely, the equitable right or interest in the mortgage of the plaintiff, as the attorney of Prior, for the fees and costs

provided for in the assignment to Jones. But this question was properly involved in the former case, and might have been there raised and determined. The neglect of the plaintiff to avail himself of it, even if it were tenable, furnishes no reason for another litigation. The right of the respective parties to the judicial mortgage was the main question in the former suit. That issue, of course, involved the whole or partial interest in the mortgage. We are satisfied, therefore, that the former suit constitutes a complete bar to the present."

Holder of note secured by second mortgage, who was made party to foreclosure suit by holder of prior mortgage, and who failed to enforce his note in that suit, cannot commence another suit on note as judgment in first suit was *res judicata.*

Brown v. Willis, 67 Cal. 235.

In suit by purchaser at execution sale against fraudulent grantee of judgment debtor to set aside deed, the fraudulent grantor was made a party and judgment rendered in favor of plaintiff. Held *res judicata* in an action by fraudulent grantor attacking the execution sale on ground that property was his homestead.

Snapp v. Snapp, 9 S. W. 705 (Ky.).

A party failing to assert a claim in equity, when it might have been litigated with propriety, will not be permitted afterwards to enforce it in a second suit.

Stewart v. Stebbins, 30 Miss. 66.

Complainant in proceedings for specific performance of contract for conveyance of coal land is estopped by a decree in his favor from maintaining an action at law for the injury to the lands committed during the pendency of the suit in equity.

Head v. Melovey, 2 Atlantic 195 (Pa.).

To the same effect are:

Nelson v. Bridges, 2 Beav. 239;

Prothers v. Phelps, 25 Law J. (N. S.) 105.

A judgment or decree rendered in a former suit is conclusive between the parties as to all matters presented and litigated therein, and as to all matters which might have been litigated or determined.

30 *Century Dig.,* Title "Judgments", Section 1241 and cases cited.

Where facts were known to complainant at time of commencement of prior suit covering the same subject matter, another action cannot be based on such facts, though they were mispleaded or not set up at all in former action.

Hightower v. Cravens, 70 Ga. 475.

In an action for an injunction to restrain an ejectment suit, plaintiff claimed an equity in the property under a contract and deed from a non-resident married woman. The bill was denied on the ground that a non-resident married woman could convey no title. Another ejectment suit was

begun in which the plaintiff in the injunction suit (who was a defendant therein) pleaded that the property was the separate property of the married woman. The facts on which this defense was based had not been relied upon in the injunction suit. Held, nevertheless, that the judgment against plaintiff in the injunction suit operated as a bar.

Rogers v. Higgins, 57 Ill. 244.

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6. DISCUSSION OF AUTHORITIES ON RES JUDICATA CITED BY APPELLANTS.

Appellants cite the case of *Southern Pacific Company v. Bogert,* 250 U. S. 483. Counsel seem to contend that this case established a new, or at least greatly modified, doctrine concerning the plea of *res judicata.* The quotation from the opinion of the court contained in appellants' brief shows that the Supreme Court announced no new doctrine. In referring to the other actions the Supreme Court in that case said:

> "In none of these suits was the question here in issue decided."

In *Southern Pacific Co. v. Bogert, supra,* the Southern Pacific Company, which held the ma-

jority of the capital stock of Houston Texas Central Railway, reorganized that company. Pursuant to the reorganization agreement mortgages upon the property of the Houston Company were foreclosed, a new company designated Houston & Texas Central *Railroad* Company was incorporated, the property of the old Company was transferred to the new Company, and all of the capital stock of the new Company was issued to the Southern Pacific Company. The action in *S. P. Co. v. Bogert, supra,* was brought by the minority stockholders in the old Houston Company "to have the Southern Pacific Company declared trustee for them of the stock in the New Houston Company and for an accounting" (p. 486).

The Supreme Court, at page 487, described the action as follows:

> "In considering the many objections urged against the decree, it is important to bear constantly in mind the exact nature of the equity invoked by the bill and recognized by the lower courts. The minority stockholders do not complain of a wrong done the corporation or of any wrong done by it to them. They complain of the wrong done them directly by the Southern Pacific and by it alone. The wrong consists in its failure to share with them, the minority, the proceeds of the common property of which it, through majority stockholdings, had rightfully taken control. In other words, the minority assert the right to a pro rata share of the common property; and equity enforces the right by declaring the trust on which the Southern Pacific holds it and ordering distribution or compensation."

It appeared that the minority stockholders in the old Houston Company had prosecuted a number of actions, most of which were against the old company itself. (See list of cases in margin at page 489.) By these actions the minority stockholders sought to set aside the foreclosure sale held under the reorganization agreement, and also sought to have the reorganization agreement declared fraudulent. But none of the former actions were in any sense actions to have the Southern Pacific Company declared a trustee for a part of the stock of the new Houston Company. In referring to the former actions the Supreme Court said (p. 490):

> "Except in so far as those cases were disposed of on objections to jurisdiction, they decided merely that the foreclosure could not be set aside as fraudulent; that the minority stockholders could not have the reorganization agreement declared fraudulent; and that they could not compel a reduction of the assessment made under it or enjoin distribution of the stock according to its terms."

It is obvious that the issue as to whether the Southern Pacific Company held certain stock in the new Houston Company as trustee for the plaintiffs was not, *and could not have been,* in issue in the former actions, as these actions sought to repudiate the whole transaction whereby the Southern Pacific Company became the holder of the stock of the new Houston Company.

In fact the contention in the *Bogert* case was rather "estoppel by election" than estoppel by judgment.

Appellants cite *Russell v. Place,* 94 U. S. 606, where the Supreme Court said,

> "If it appear that several distinct matters may have been litigated, upon one or none of which the judgment may have passed without indicating which of them was thus litigated, and upon which the judgment was rendered, the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined."

The following is an excerpt from the syllabi in *Russell v. Place, supra:*

> "In an action at law for damages for the infringement of a patent for an alleged new and useful improvement in the preparation of leather, which patent contained two claims, one for the use of fat liquor generally in the treatment of leather, and the other for a process of treating bark-tanned lamb or sheep skin, by means of a compound composed and applied in a particular manner, the declaration alleged, as the infringement complaint of, that the defendants had made and used the invention, and caused others to make and use it, without averring whether such infringement consisted in the simple use of fat liquor in the treatment of leather, or in the use of the process specified. Held, that the judgment recovered in the action does not estop the defendant in a suit in equity by the same plaintiff, for an injunction and an accounting for gains and profits, from contesting the validity of the patent, it not appearing

by the record, and not being shown by extrinsic evidence, upon which claim the recovery was had. The validity of the patent was not necessarily involved, except with respect to the claim which was the basis of the recovery: a patent may be valid as to a single claim and invalid as to the others."

CONCLUSION.

Although the pleadings in the case at bar and in the two actions in which the judgments pleaded were rendered are quite voluminous the facts in this whole transaction are very simple.

On September 2, 1914 a sale was made under the first deed of trust. On the same date a new deed of trust for $2455.00 was made for the benefit of Daniel A. McColgan, who was also the beneficiary under the first deed of trust.

By the action of *Lineker v. McColgan* (No. 5344) the plaintiff sought to recover the alleged surplus proceeds of the sale made under the first deed of trust on September 2, 1914. He also sought to have the sale under the second deed of trust enjoined, claiming that there was due to him as the proceeds of the sale under the first deed of trust a sum in excess of $2455.00, the amount of the second deed of trust. The complaint also attacked the validity of this deed of trust alleging that it was given, not as security for the promissory note for $2455.00 referred to therein, but to protect Daniel A. Mc-

Colgan against any liens which he might have to pay on the land.

In *Lineker v. McColgan* (No. 5344) it was adjudicated that the plaintiff was not entitled to any part of the surplus proceeds of the sale held on September 2, 1914, and it was also adjudicated that the second deed of trust was given (as it purported to have been given) to secure the sum of $2455.00 borrowed from Daniel A. McColgan by R. S. Marshall, as the agent of, and trustee for, the Linekers.

Likewise in the action of *Marshall v. McColgan* (No. 5353) the validity of the second deed of trust was adjudicated.

It is obvious, therefore, that the cause of action herein sued upon is the very cause of action adjudicated adversely to the Linekers in the action of *Lineker v. McColgan* (No. 5344) and in the action of *Marshall v. McColgan* (No. 5353) for in this action the plaintiff seeks to recover the alleged surplus proceeds of the sale held on September 2, 1914, and also attacks the validity of the second deed of trust for $2455.00.

It is respectfully submitted that the judgment should be affirmed.

Dated, San Francisco,
March 20, 1925.

ALFRED J. HARWOOD,
Attorney for Appellees Adelaide McColgan, administratrix, etc., and R. McColgan.